individualism of the early industrial revolution. But quite aside from any questions of policy or of substance, the concept of assuming the risk is purely duplicative of other more widely understood concepts, such as scope of duty or contributory negligence.[148] The one exception is to be found, perhaps, in those cases where there is an actual agreement. Moreover, the expression has come to stand for two or three distinct notions which are not at all the same, though they often overlap in the sense that they are applicable to the same situation.

Except for express assumption of risk, therefore, the term and the concept should be abolished. It adds nothing to modern law except confusion. For the most part the policy of individualism it represents is outmoded in accident law; where it is not, that policy can find full scope and far better expression in other language. There is only one thing that can be said for assumption of risk. In the confusion it introduces, it sometimes—ironically and quite capriciously—leads to a relaxation of an overstrict rule in some other field. The aura of disfavor that has come to surround it may occasionally turn out to be the kiss of death to some other bad rule with which it has become associated. We have seen how this may happen with the burden of pleading and proving an exceptional limitation on the scope of defendant's duty. There may be other instances.[149] But at best this sort of thing is a poor excuse indeed for continuing the confusion of an unfortunate form of words.

148. It has been said, "If the words 'assumption of risk' were dropped from the vocabulary of the courts, it is doubtful that there would be any change in established legal principles governing the relationship of host and guest, whether in the real property or the automobile cases." Rice, *The Automobile Guest & the Rationale of Assumption of Risk*, 27 MINN. L. REV. 429, 439, 440 (1943). *But cf.* White, *Liability of an Automobile Driver to a Non-Paying Passenger*, 20 VA. L. REV. 326, 347 (1934).

149. See Gordon, *Wrong Turns in the Volens Cases*, 61 L.Q. REV. 140, 145 *et seq.* (1945), which suggests that preoccupation with the doctrine of *Volens* sometimes led courts to grant recovery to a workman who could *avoid this defense* (as by showing protest against the risk, or a promise to remedy it) whereas accurate analysis of the case would reveal no breach of duty by the employer.